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No. 89-1799

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1989

JEFFREY M. MASSON,
Petitioner

v.

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC, AND
JANET MALCOLM,
Respondents

PETITIONER'S REPLY TO BRIEF AND SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

By his petition, Jeffrey M. Masson asks this Court to review a decision of the Ninth Circuit Court of Appeals that allows and encourages writers to substitute manufactured quotations for the actual words of public figures. The Ninth Circuit granted summary judgment in favor of respondent Janet Malcolm and her publishers even though it was "uncontroverted that Malcolm fictionalized certain quotations and attributed them to Masson." (App. A at A-31). Petitioner contends that respondents' attribution to him of deliberately altered, defamatory quotations was a "calculated falsehood" not entitled to any First Amendment protection.

The Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit ("Brief in Opposition") asserts that petitioner seeks to impose liability on any writer who departs from full, verbatim quotation. Respondents argue that the decision was correct because Malcolm's disregarded notes prove that Masson actually made the disputed statements and, even if he did not, Malcolm's deliberate changes did not substantially alter the content of Masson's words. Finally, the Brief in Opposition cites newly discovered cases in the Second, Fourth and Fifth Circuits which purportedly support the Ninth Circuit's decision below.

In the Supplemental Brief of Respondents In Opposition to Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit ("Supplemental Brief"), respondents argue that there is little difference between the majority and dissenting opinions below, and that under either rationale Malcolm's alterations were not substantially false.

REASONS FOR GRANTING THE WRIT

Contrary to the Brief in Opposition's claim at 1, 11-13, Masson does not hope that this Court will force writers to become mere transcribers of ungrammatical, interminable, tape-recorded interviews. Journalists and writers are certainly protected when they make immaterial changes, irrelevant to the content of a person's statements, in order to correct grammar or syntax. (App. A at A-74-75) (Kozinski, J., dissenting). Quotes need not be lengthy to be accurate, and if respondents had been willing to check the accuracy of their quotations, as Masson requested, they could have published articles containing dozens of quotations with no danger of litigation.

Respondents, however, were more interested in sensation than accuracy; they did not simply want to repeat Masson's relatively bland statement that analysts felt he "was a private asset but a public liability," so they deliberately invented the much more provocative confession of self-loathing: "I was like an intellectual gigolo." (App. A at A-12-13). This defamatory fabrication was not merely an inconsequential change in terminology, as respondents claim, and Malcolm took similar liberties with other passages, repeatedly falsifying their tone and content to illustrate Malcolm's opinions of her subject. (See discussion in App. A at A-39-49 (Kozinski, J., dissenting).

Neither the Ninth Circuit nor respondents has stated a persuasive reason for encouraging these deliberate falsifications. The new cases cited by respondents, though illustrating the pervasiveness of altered quotations, provide no support for the Ninth Circuit's decision. The other Circuits denied liability under very different circumstances without

sanctioning the deliberate fabrication championed by respondents.1/

Apparently uncomfortable with the full implications of the Ninth Circuit's rationale, respondents repeatedly refer to Malcolm's discredited notes to establish that she actually altered nothing. (Brief in Opposition at 1, 4, 6, 6 n. 4, 11, 14, 17, 18, 20, 21, 25). Respondents deride Masson's contention that the notes were fabricated (Brief in Opposition at 25), but unlike the plaintiff in Contemporary Mission, Masson presented substantial evidence that Malcolm did fabricate the notes. (See discussion in App. A at A-44-45 n. 7) (Kozinski, J., dissenting)

Under Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986), the Ninth Circuit could not consider the disputed notes, and its holding is meant to protect quotations that were "deliberately altered" as long as the alterations were not, in the Court's view, substantive. (App. A at A-5, 10-

1/ In both Southard v. Forbes, Inc., 588 F.2d 140, (5th Cir.), cert. denied, 444 U.S. 832 (1979), and Tate v. Bradley, 837 F.2d 206 (5th Cir, 1988), the Court determined that the quotes were not defamatory. Contemporary Mission, Inc. v. New York Times Co., 842 F.2d 612, 625 (2d Cir. 1988) cert. denied, 109 S.Ct. 145 (1989) found no basis for doubting the writer's good faith or the authenticity of contemporaneous notes, while Ryan v. Brooks, 634 F.2d 726, 729, 733 (4th Cir. 1980), involved only a paraphrasing of newspaper articles which did not purport to be a direct quotation of the plaintiff. Readers, of course, "give far greater weight to direct quotations than to descriptions or paraphrases by the author" (App. A at A-37 (Kozinski, J. dissenting). These cases reinforce the approach to this issue taken by Judge Kozinski in App. A at A-70-88. See also Masson v. New Yorker: But Don't Quote Me On That, 21 Pac.L.J. 1107, 1132-1136 (1990) (discussing Ninth Circuit's blurring of distinction between quotes and non-quoted paraphrases).

11). The Ninth Circuit's application of this holding to the facts demonstrates that it will produce wildly inconsistent results.

As the amici curiae briefs of the Journalists and Academics Concerned About Media Integrity and the Mountain States Legal Foundation explain fully, the Ninth Circuit's decision actually harms the First Amendment values it purports to protect. In striking contrast to almost any other media libel victory, the Ninth Circuit's holding threatens journalists as well as public figures. This Court must act to prevent further damage to reputations and to the First Amendment.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition for Writ of Certiorari and the briefs amici curiae, a writ of certiorari should issue to review the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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